

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1306

To be argued by
RAYMOND A. LEVITES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1306

UNITED STATES OF AMERICA,

B
P/S
Appellee,

—v.—

CARL BENEDETTO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RAYMOND A. LEVITES,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	6
The Government's Rebuttal Case	9
ARGUMENT:	
POINT I—The District Court Did Not Abuse Its Dis- cretion In Admitting Proof Of Similar Acts ...	10
POINT II—No Error Was Created By The Cross- examination of Benedetto	16
POINT III—The Court Did Not Err In Permitting the Government to Inquire As to Benedetto's Use of Drugs	19
CONCLUSION	20

TABLE OF CASES

<i>Brehm v. United States</i> , 196 F.2d 769, cert. denied, 344 U.S. 838 (D.C. Cir. 1952)	12
<i>Scott v. United States</i> , 172 U.S. 343 (1899)	18
<i>United States v. Arcujo</i> , 539 F.2d 287 (2d Cir. 1976)	11
<i>United States v. Boatner</i> , 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973)	18
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), cert. denied, 45 U.S.L.W. 3790 (June 6, 1977)	11

	PAGE
<i>United States v. Byrd</i> , 352 F.2d 570 (2d Cir. 1965)	13
<i>United States v. Cavallaro</i> , 553 F.2d 300 (2d Cir. 1977)	11
<i>United States v. Gardin</i> , 382 F.2d 601 (2d Cir. 1967)	13
<i>United States v. Grady</i> , 544 F.2d 598 (2d Cir. 1976)	11, 12
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966)	19
<i>United States v. Jenkins</i> , 510 F.2d 495 (2d Cir. 1975)	17
<i>United States v. Johnson</i> , 382 F.2d 280 (2d Cir. 1967)	13
<i>United States v. Kaufman</i> , 453 F.2d 306 (2d Cir. 1971)	11
<i>United States v. Laurelli</i> , 293 F.2d 830 (3rd Cir. 1961), cert. denied, 368 U.S. 961	12, 13
<i>United States v. Leonard</i> , 524 F.2d 1075 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976)	11, 17
<i>United States v. Lieblich</i> , 246 F.2d 890 (2d Cir.), cert. denied, 355 U.S. 896 (1957)	17
<i>United States v. Magnano</i> , 543 F.2d 431 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977)	11
<i>United States v. Murphy</i> , 480 F.2d 256 (1st Cir. 1973), cert. denied, 414 U.S. 912 (1973)	12
<i>United States v. Natale</i> , 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976)	11
<i>United States v. Nussen</i> , 531 F.2d 15 (2d Cir. 1976), cert. denied, 429 U.S. 839 (1976)	17
<i>United States v. Pacelli</i> , 521 F.2d 135 (2d Cir. 1975), cert. denied, 424 U.S. 911	16

	PAGE
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975)	11
<i>United States v. Santiago</i> , 528 F.2d 1130 (2d Cir.), cert. denied, 425 U.S. 972 (1976)	11
<i>United States v. Trapnell</i> , 495 F.2d 22 (2d Cir.), cert. denied, 419 U.S. 851 (1974)	17
<i>United States v. Viruet</i> , 539 F.2d 295 (2d Cir. 1976)	11
<i>United States v. Vivero</i> , 413 F.2d 971 (2d Cir. 1969) (per curiam), cert. denied, 396 U.S. 1017 (1969)	18

TABLE OF STATUTES AND AUTHORITIES

Federal Rules of Evidence, Rule 404(b)	12
Federal Rules of Evidence, Rule 607	17
Federal Rules of Evidence, Rule 611(b)	16
McCormick, <i>Evidence</i> § 157 (1954)	12
2 Weinstein & Berger, <i>Evidence</i> (1976) ¶ 404 [09] (3)	12
2 Wigmore, <i>Evidence</i> § 304 (3d. ed. 1940)	12

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1306

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARL BENEDETTO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Carl Benedetto appeals from a judgment of conviction entered on June 29, 1976, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictments 76 Cr. 1035, a three count indictment, was originally filed on November 9, 1976, and was twice superseded, on March 10, 1977 and April 28, 1977.* Each of the four counts charged Benedetto, an inspector with the United States Department of Agriculture, with receiving and accepting money in connection with his official duties from wholesale meat packers engaged in interstate com-

* The first superseding indictment corrected errors in the original indictment. The second superseding indictment added a count.

merce, in violation of Title 21, United States Code, Section 622.

Trial commenced on May 5, 1977. On May 10, 1977 the jury returned a verdict of guilty as to each of the four counts in the indictment.

On June 29, 1977 Judge Cooper imposed a sentence of eighteen months confinement on each count, to run concurrently.

Benedetto is presently at liberty pending the disposition of this appeal.

Statement of Facts

The Government's Case

Carl Benedetto was appointed an inspector in the Animal and Plant Health Inspection Service of the United States Department of Agriculture June 24, 1968 and served continuously through January 3, 1975.* (Tr. 15). As an Inspector with the United States Department of Agriculture, Benedetto's responsibilities included the enforcement of sanitation standards at the wholesale meat processing establishments and the proper identification of meat products. His primary concern was to insure that the meat leaving the processing plant was wholesome, clean, and fit for human consumption. (Tr. 23).

The inspector assigned to a wholesale meat packer checks for wholesomeness by examining incoming meat to make sure it came from an official federally inspected slaughter house and to satisfy himself that it is clean. (Tr. 23). With respect to the sanitation standards of the

* References to the trial transcript are abbreviated as "Tr."; references to Government Exhibits are abbreviated as "GX."

establishment's for a generally acceptable cleanup before all operations to commence and for good housekeeping throughout the day as operations proceed.

The inspector's duties include observations of floors, walls, ceilings, meat rails, hooks and containers, as well as cutting knives and saws for dirt, grease, flaking rust and condensation of water which can collect on dirty surfaces and contaminate meat. He also looks for rodent and insect contamination. (Tr. 26-27).

As an inspector, Benedetto enjoyed a high degree of discretion in assessing conditions at a meat packing establishment and imposing a broad range of corrective sanctions. (Tr. 27-31). During the period 1972 through 1974 the inspector could simply verbally direct a plant supervisor to correct an unsanitary condition. (Tr. 28). In cases of more serious or widespread conditions any part or all of the physical facilities of the plant deemed unfit, by the inspector, for production of meat products could be rejected and "tied off." (Tr. 29-30). The inspector could thus indefinitely exclude from use a work table, a power cutting saw, an entire room or, in extreme instances, could close off a whole plant by putting a piece of string with a rejection tag across the main entrance to the plant. (Tr. 30). Inspectors such as Benedetto were also free to retain meat determined to be in objectionable condition and thereby to withhold the "inspected and passed" stamp and preclude shipping. Anything from a lambchop to a ton of meat or more could be retained by the inspector. (Tr. 30). During the period 1972 through 1974 Benedetto and his fellow inspectors could, if they found sanitation to be poor over a period of time, withhold from the establishment the issuance of the vital brands for stamping the meat "inspected and passed." (Tr. 25).

At various times during the period between 1972 and 1975 Benedetto was assigned as an inspector at Western Meat, Inc., Plaut and Stern, Inc., Park Packing Corp. and

Eastern Meat, Inc. (Tr. 45-54), Joseph Staiman, the President of Western Meat Inc. (Tr. 123), Harry Langsam, President of Plaut and Stern, Inc. (Tr. 223), Jerome N. Daitch and Jerome Peskin, the President and Secretary, respectively, of Park Packing Corp. (Tr. 297, 392), and Seymour Hirsch, Secretary of Eastern Meat, Inc. (Tr. 325) were the principal witnesses for the Government.* All five of the corporate officers admitted that they had paid many Department of Agriculture inspectors, including Benedetto. (Tr. 147-48, 242-43, 306, 331, 394). Indeed, their testimony revealed that there had existed a pervasive and continuous pattern of corruption involving numerous federal inspectors assigned to inspect the cluster of meat packing establishments in the old Westchester Avenue market area in the Bronx. (Tr. 150, 262, 302-03, 331, 358-59). The physical facilities in the Westchester Avenue market area where the Government's witnesses maintained their plants during the period 1972 through 1974 were dilapidated and difficult to maintain in compliance with Department of Agriculture standards (Tr. 31-33). It was known as early as 1968 that a new and superior market area was to open in Hunts Point, and most of the Westchester Avenue establishments ultimately relocated there. (Tr. 34). Consequently few substantial repairs were undertaken by the buildings' owners during the years 1972, 1973 and 1974. (Tr. 36-37). The Government witnesses were tenants in these rather dilapidated buildings, some of which had actually been condemned. (Tr. 124, 234-35, 303-04, 326).

* Staiman, Langsam, Daitch, Peskin and Hirsch each testified pursuant to an agreement with the Government which provided that in return for his cooperation in the Government's investigation into the meat industry and truthful testimony before the grand jury and at any subsequent legal proceedings he would receive complete personal immunity. Their corporations, however, were subjected to criminal prosecution. (Tr. 152-58, 161, 165, 249-53, 314-18, 338-45, 335-58; GX 15, 17, 21, 22).

It was under these circumstances that Benedetto presented himself as an inspector at the packing companies enumerated in the indictment. On his first Friday at Western Meat, Inc. Benedetto simply entered Staiman's office and announced "Today is Friday, let's have it." (Tr. 127-31). At Plaut and Stern Inc., he began by vigorously enforcing the rules and, asserting that the law required it, closing off work areas. When Langsam complained, Benedetto inquired as to whether Langsam was "taking care of the inspector." (Tr. 238-40). Shortly after arriving at Eastern Meat, Inc., Benedetto noted and observed several defects on the premises and then suggested to Hirsch that if he, Benedetto, were taken care of at the end of every week, Hirsch in return would be allowed to continue on with his business without too much interruption or harrassment. (Tr. 329, 349). Daitch of the Park Packing Company had a similar conversation with Benedetto when the latter was assigned to his plant. (Tr. 300, 302).

The operators of the packing companies thereafter paid varying sums of money on a weekly basis over the remainder of Benedetto's assignment tour, Staiman paid Benedetto by shaking hands and thereby passing him between twenty and twenty-five dollars in cash. This practice was repeated every week Benedetto was assigned to Plaut and Stern, Inc. (Tr. 127-31). In return for the money Staiman was not harrassed by Benedetto. (Tr. 131). Langsam paid Benedetto twenty-five dollars in cash on Fridays when he returned the brands to the inspector, unless Benedetto was absent, in which case he was paid the following Monday. Langsam successfully resisted Benedetto's attempts to increase the amounts paid. (Tr. 241-45). On Fridays Daitch of Park Packing passed Benedetto an envelope containing between fifteen and twenty-five dollars in cash. (Tr. 307-09). Peskin, Daitch's partner was present on several occasions when Daitch paid Benedetto. (Tr. 392-94). Benedetto asked

Peskin whether he knew that "we get paid every week", and Peskin himself paid Benedetto twenty dollars on approximately fifteen occasions. (Tr. 392-93). Hirsch of Eastern Meat, Inc. also paid on Fridays by passing Benedetto twenty-five dollars in currency which had been folded up. (Tr. 330-31). This was done some twenty times. (Tr. 333).

As evidence of a prior similar act, the Government also called Arthur Breth, of Arthur Breth and Son. Breth had been in the wholesale meat business for forty-nine years and during the period from 1972 through 1975 had operated in the Westchester Avenue Market. (Tr. 412-13). Under a grant of immunity, Breth testified he had paid Benedetto bribes of about ten dollars on ten to fifteen occasions. (Tr. 415, 417-18, 422-425).

The Defense Case

The defense called four witnesses who worked in meat processing plants which Benedetto had inspected. Each witness testified that Benedetto had not solicited bribes from them. To this effect, Richard Hinke, a wholesale butcher, who worked at a plant which had been inspected by Benedetto on two or three occasions, testified that Benedetto had never asked Hinke or anyone else for money. Hinke characterized Benedetto as "one of the better inspectors around." (Tr. 428-29). Joseph Neal, a supervisor at the Imperial Veal Company, stated that Benedetto had been an inspector at Imperial Veal and that Benedetto had never approached Neal for any money. (Tr. 437-38, 440).^{*} However, Neal conceded that the year Benedetto had been at his plant was the year the investigation by the Government of the meat inspectors

^{*} Imperial Veal was the same slaughterhouse in which Herman Lustgarten worked.

became public knowledge. (Tr. 442-43). Joseph Abazia, plant manager of Pork Packers, Inc., testified that Benedetto had never asked him for any money and that Benedetto had required that proper corrective sanitary actions be taken. Arthur Scheer, plant manager of the Jay-Lind Veal Corporation, testified that Benedetto was an inspector at his plant, which was not in the Westchester market area. (Tr. 515-16). Scheer was asked to give, and did give, his opinion that Benedetto was honest. (Tr. 511-12).

Benedetto testified in his own behalf. He firmly denied accepting any monies or things of value from any of the Government's witnesses or from anyone. (Tr. 457-58, 463). Benedetto suggested that Staiman in particular, and the other Government witnesses in general had threatened to implicate him, and had in fact done so, because he had cost them money by his vigorous enforcement of the Department of Agriculture regulations. (Tr. 458, 462, 486).

Under cross-examination, Benedetto claimed that he had been offered money but had turned it down. Confronted with his obligation to report such offers, he attested that he had reported the offers to a supervisor who was deceased at the time of the trial. Benedetto could not explain why his written reports of these attempts to impair his integrity "seem[ed] to be missing" from the Department's files, which had been subpoenaed by his attorney. Benedetto also admitted that he had not reported any of the offers to his other supervisor, McAvoy, who was still alive. (Tr. 469-72). Benedetto similarly claimed to have no knowledge whatever of any other inspectors taking money, or of any discussions about the subject among the inspectors. (Tr. 474-75). Whereas on direct Benedetto testified that his practice was to prohibit meat packers from operating in unsanitary conditions, he

admitted on cross-examination that his supervisors had discovered an unsanitary condensation condition at Imperial Veal and Lamb, the plant where the defense witness, Neal, and the Government's rebuttal witness, Lustgarten, both worked. Benedetto further admitted that he had been reprimanded in writing by his superiors for consistently neglecting his responsibilities in not correcting this particular unsanitary condition and had been told that further neglect of responsibilities would result in a recommendation that necessary administrative charges be filed against him. (Tr. 487-93).

Benedetto denied that there was any justifiable factual basis for the reprimand. (Tr. 492, 497-98). Mr. Benedetto was shown the letter of reprimand and after he asserted generally that it contained false statements about his inadequate performance as an inspector at Imperial Lamb and Veal, the Government then offered the letter in evidence (GX 25), to allow the defendant to testify specifically as to which critical observations were untrue. (Tr. 498-99). Just as Benedetto had previously testified that the Government's witness had been "out to get" all the other inspectors they testified against, as well as himself (Tr. 474, 486), he now claimed that the letter of reprimand concerning his performance at Imperial Veal and Lamb was a "set-up job" and that his supervisors had been harassing him because of his higher standards and because he "made waves." (Tr. 490, 497, 502-03).

During the course of the cross-examination, the Government informed the court and defense counsel of its intention to ask Benedetto whether he used drugs. After a good faith factual basis for the question was established, the court permitted the question on the theory that Benedetto's motive in accepting bribes was, in part, to finance his use of cocaine and marijuana. (Tr. 478-80). When Benedetto denied any such use of drugs, the Government,

of course, did not pursue his negative reply. (Tr. 493-94).*

In the face of Benedetto's testimony that he never took bribes from any of the government witnesses who testified against him or from anyone else, the Government asked Benedetto on cross-examination whether he had accepted money from Herman Lustgarten while Lustgarten was employed by the A. J. Shaffer Meat Company. Benedetto denied having accepted monies from Lustgarten and he denied having had a conversation with Lustgarten in which he, Benedetto, demanded more money.

The Government's Rebuttal Case

In rebuttal the Government called Herman Lustgarten. Lustgarten testified that during 1973 in connection with Benedetto's work as an inspector, Lustgarten had periodically given Benedetto ten dollars in cash, crumpled up and passed in a handshake. When Benedetto was assigned for a steady tour of duty at Shaffer he told Lustgarten that he was "not going to stick his neck out any more for ten dollars a week" and that he wanted "more money." Lustgarten, who had received the money he had previously paid Benedetto from his employer, Shaffer, told Benedetto that he would have to see Shaffer. From then on Benedetto did see Shaffer. (Tr. 524). Lustgarten testified that he had

* The Court immediately instructed the jury as follows:

Before I forget, the jury will understand that you are never to accept as a fact that which is incorporated in a question when there is a negative answer. So when a witness is asked, as this witness was, about cocaine, you are not to gather anything from the question because you remember the answer was "no". Do I make myself clear? That's important, to remember that facts incorporated in a question do not become facts in the case unless they are admitted. (Tr. 495).

been very friendly with Benedetto, still liked him, and wanted to soften his testimony against him but, in good conscience, was unable to do so. (Tr. 529, 544-45).

ARGUMENT

POINT I

The District Court Did Not Abuse Its Discretion In Admitting Proof of Similar Acts.

Benedetto's first claim on appeal is that the District Court committed reversible error in permitting the Government to prove two similar acts, one on its direct case and one on rebuttal. Specifically, in addition to the proof of the four payoffs charged in the indictment, the Government proved that, during the same time period, the defendant took money from two other meat companies which he was assigned to inspect. In allowing this proof, the District Court was well within the bounds of the wide discretion allotted to it on this issue and this claim of reversible error is therefore insubstantial.

Of course, the starting point for analysis is Rule 404(b), which provides that:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The law in this circuit has consistently upheld the admission of similar act proof "unless offered *solely* to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to

overwhelm its probative value . . .” *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (emphasis supplied). *Accord United States v. Cavallaro*, 553 F.2d 300, 305 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Araujo*, 539 F.2d 287 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Moreover, the balancing of relevance against prejudice is entrusted to the district judge whose exercise of discretion will be overturned only in cases of grave abuse. *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Santiago*, *supra*.

In this case, the District Court permitted the Government to introduce testimony of one similar act in its direct case, through Arthur Breth, and of one in its rebuttal case, through Herman Lustgarten. This proof established that in each instance the defendant had improperly accepted money from an employee or principal of a meat packer during the same time period as the events charged in indictment.* Thus, the defendant cannot argue that this proof of similar acts lacked the requisite similarity. Obviously, this proof compares most favorably with prior acts found by this Court to be sufficiently similar to merit admission. See *e.g. United States v. Leonard*, *supra*; *United States v. Kaufman*, 453 F.2d 306 (2d Cir. 1971).

* Breth testified that he paid Benedetto in 1973 or 1974. (Tr. 414). Lustgarten testified that he paid him in 1973. (Tr. 522). Both periods overlap the periods of time charged in the indictment.

Accordingly, the defendant's primary challenge to this evidence comes from a claim that the evidence of similar acts had no proper purpose, as required by Rule 404(b). Limiting his attention to only certain portions of the Rule, he argues that this proof was not properly admissible on the issues of intent or identity. Contrary to this assertion, the evidence of the similar acts was properly admitted to prove not only intent and identity, but also to prove a common scheme or plan.

First, the District Court properly admitted this evidence to show a general plan or scheme. The similar act helped to establish the fact that Benedetto was engaged in a continuing scheme to use his position as a federal meat inspector to obtain cash payoffs. Under the terms of Rule 404(b) and pertinent case law, similar act evidence is properly received for this purpose. *United States v. Grady*, *supra*, 544 F.2d at 605; *United States v. Murphy*, 480 F.2d 256, 260 (1st Cir. 1973), *cert. denied*, 414 U.S. 912 (1973); (evidence of payments to meat inspector admissible where the Court observes "a nexus between the evidence and the offense on trial"). *United States v. Laurelli*, 293 F.2d 830 (3rd Cir. 1961), *cert. denied*, 368 U.S. 961 (testimony of subsequent bribe offer by defendant admissible to prove bribery of Government inspector); *Brehm v. United States*, 196 F.2d 769, *cert. denied*, 344 U.S. 838 (D.C. Cir. 1952) (proof of receipt by Congressman of political contribution from one employee admissible to prove his acceptance of similar payment from another).

It is particularly appropriate to admit similar act evidence to show a plan or design where the similar acts have unusual characteristics, shared by the crimes charged, making it more probable that the defendant committed the crimes charged. 2 Weinstein & Berger, *Evidence* (1976), ¶ 404[09] (3); 2 Wigmore, *Evidence* § 304 (3d ed. 1940); McCormick, *Evidence* § 157 (1954). Here, the similar act evidence showed not only a pattern of accepting bribes; the testimony revealed a similar

technique for receiving the cash: the passing of folded bills by way of a handshake. In the face of a defense that no payoffs took place, evidence that showed the defendant accepting payments in the very same way was certainly admissible.

In addition, the similar act proof was properly admitted on the issues of knowledge and intent. Although Benedetto argues that knowledge and intent were not in issue, he overlooks authority in this circuit which permits the Government to meet its burden of proving intent by establishing similar acts. *United States v. Gardin*, 382 F.2d 601, 604 (2d Cir. 1967); *United States v. Johnson*, 382 F.2d 280, 281-82 (2d Cir. 1967); *Cf. United States v. Byrd*, 352 F.2d 570 (2d Cir. 1965).*

In a case close to this one, *United States v. Laurelli*, *supra*, a defendant, who was charged with offering bribes to a government inspector, argued on appeal that proof of a subsequent similar offer to pay bribes should have

* Indeed, the District Court clearly articulated this when Benedetto suggested below that intent was not at issue:

Mr. Gallagher: "I would oppose that. Of course, my understanding of the law is that it is up to the discretion of the Court as to whether or not such testimony is permitted to go into evidence. In my opinion it would be highly prejudicial. . . . Certainly there can be no question of intent, Your Honor. If Mr. Benedetto took the money, he took the money. There is no question about it, intent doesn't come into it . . . I am sure the Court isn't going to charge intent. . . ."

The Court: I certainly intend to charge intent. I must, or I think I'd be flayed by the higher Court, so I have got to charge intent. . . ." (Tr. 378-79).

been excluded from the evidence at his trial. The Third Circuit upheld the admission of this evidence finding it proper as proof of both intent and pattern. The Court stated that "the alleged subsequent offenses were the very same type of thing for which the defendant was accused in the bribery charge" and that the evidence was admissible "especially under these circumstances." 293 F.2d at 832.

Moreover, the similar act evidence in this case was admissible on the issue of identity. This issue was raised in the defense opening when defense counsel argued that the defendant would have a hard time proving where he was on the dates alleged in the indictment. (Tr. 12). This tack was pursued when defense counsel extensively cross-examined Puchta and McAvoy of the Department of Agriculture as to the accuracy and completeness of the Department of Agriculture time and attendance records which the Government offered to prove Benedetto's presence on the dates of the bribe payments. (Tr. 81-5, 88-96, 187-206, 220-25; GX 4-12). Government witnesses against Benedetto were also subjected to cross-examination as to whether they had known Benedetto by name or only general appearance, whether they had selected his photograph from an array of photographs, and as to the circumstances under which they identified him to the United States Attorney as one of the inspectors who had received money unlawfully. (Tr. 167-68, 280-82, 341-45, 539-542). In the face of this line of defense, the similar act evidence was admissible on the issue of identity.

In sum, there were several independent bases for admission of the similar act evidence. In balancing the probative value against undue prejudice, the District Court could properly consider that the similar act proof involved nothing shocking and established acts no different in nature from those already before the jury. The District Court properly limited the jury's consideration

of the similar act proof in its charge to the jury.* The trial judge's exercise of discretion was proper and certainly created no error requiring a reversal of Benedetto's conviction.

* The District Court's charge was as follows:

"What has the law to say on that score? You heard a great deal—some testimony, rather, with regard to similar acts. That means acts alleged to have been committed by this defendant, but not within the time period embraced in the indictment, but of a similar nature. That is that he took money on other occasions. Why does the law allow that to be done? It was received into evidence. I think I can make you understand, if you will listen to me with the care that you have up to this moment. The law simply says, "Acts and conduct similar to those charged in the indictment, if you so find, may be considered circumstantial evidence on the issue of this defendant's criminal knowledge, intent, plan and preparation with respect to the charges embraced in the indictment." It goes to his intent, and that is the only reason it is received. It is not received to show that he is a person of bad character. It is received, I repeat, and may be considered by you only on the issues of criminal intent of the defendant, or knowledge, or plan, or preparation with regard to those charges that are set forth in the indictment.

It is not received to show that if he committed illegal acts before, he must have done it with regard to the acts charged. Not at all. It is additional evidence; that is all its purpose is, these similar acts. It is additional evidence going to the intent, the plan, the purpose of the defendant with respect to the acts charged in the indictment.

Have I put that over? Does anybody have any questions? Don't be afraid. That is what we are here for. You are the ones who have got to apply the law. I may know it and not be able to tell it to you. That does not do with you any good.

Did you get it? Would you nod your head and indicate to me that you have? Thank you."

POINT II

No Error Was Created by the Cross-Examination of Benedetto.

Benedetto raises a multiple claim of error with respect to his cross-examination and concludes it deprived him of a fair trial. First, Benedetto argues that he should not have been subjected to any questions concerning his prior relationship and conversations with Lustgarten, because they were not at issue in the indictment. Second, he contends that Lustgarten's testimony was ultimately inadmissible for any purpose whatever as direct evidence, and was erroneously admitted by the trial court as rebuttal evidence. Finally, Benedetto argues that the Government "unnecessarily excited Mr. Benedetto" and "needlessly assumed a great deal of time" (Br. 19) by confronting him with an official letter of reprimand from his superiors after the defense itself, over Government objection, had put on witnesses to establish Benedetto's competence. (Tr. 429-30, 438). His contentions are utterly devoid of merit.

In arguing that the Government improperly cross-examined Benedetto about bribes he received from Lustgarten, Benedetto appears to forget that the Government is entitled to test a defendant's credibility on matters to which he attested before the jury. Not surprisingly, the governing provision, Rule 611(b), Fed. R. Evid. permits cross-examination about "the subject matter of the direct examination and matters affecting the credibility of the witness." Here, where Benedetto chose to swear that he never took money from any employee of any plant he had inspected, (Tr. 463), the Government was entitled to test that claim with facts that showed it to be untrue. This was clearly within the proper scope of cross-examination, a matter which is left to the discretion of the District Court, *cert. denied*, 424 U.S. 911; *United States v. Pacelli*,

521 F.2d 135 (2d Cir. 1975); *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975).*

Benedetto next argues that even if Lustgarten's testimony were to have been admissible during the Government's case in chief, or even if limited cross-examination as to prior conversations between Lustgarten and Benedetto were to be deemed appropriate; it was still error for the Court to have permitted Lustgarten to testify as a rebuttal witness because this constituted improper extrinsic proof as to a collateral matter. (Br. 16-17). He also argues, somewhat inconsistently, that since this proof could have been offered on the Government's direct case, it should not have been received on rebuttal.

As to the latter contention, even the cases cited by Benedetto, demonstrate that evidence admissible on the Government's direct case may, in the trial judge's discretion, be received on the rebuttal case. *United States v. Trapnell*, 495 F.2d 22 (2d Cir.), cert. denied, 419 U.S. 851 (1974); *United States v. Lieblich*, 246 F.2d 890 (2d Cir.), cert. denied, 355 U.S. 896 (1957). The scope of rebuttal is within the wide discretion of the trial judge, *United States v. Nussen*, 531 F.2d 15, 20 (2d Cir. 1976), cert. denied, 429 U.S. 839 (1976) and the decision to permit proof of similar acts on rebuttal was surely a reasonable exercise of that discretion. Indeed, this Court has suggested that similar act evidence is more safely admitted upon the Government's rebuttal case. *United States v. Leonard*, *supra*, 524 F.2d at 1092.

As to the claim that Lustgarten's testimony went to a collateral matter, and was therefore inadmissible on the rebuttal case, Benedetto again forgets that he opened the door to this proof by making the sweeping claim in his

* Although it is clear that the defendant opened the door to this line of cross-examination, the Government was entitled to pursue it in any event as an act of misconduct which bore on veracity. Rule 607, F.R. Evid.

direct testimony that he had never accepted payments in his capacity as a federal inspector. Lustgarten's testimony was similarly admissible to meet the impression created by the array of defense witnesses who testified that Benedetto inspected their meat plants and never asked for payoffs. Since the defense case sought to convince the jury that Benedetto never accepted bribes on any occasion, it would have been unfair to preclude available proof to the contrary offered in rebuttal.*

Finally, Benedetto complains that he was improperly cross-examined about an incident in which he was reprimanded for failure to correct an unsanitary condition at a plant which he was responsible for inspecting. Again, he opened the door to this inquiry by offering evidence that he was a competent inspector who properly fulfilled his responsibilities. (Tr. 428-29). Of course, Benedetto's evidence as to his good conduct as an inspector was offered in an effort to negate proof that he overlooked violations out of corrupt motives. The Government was entitled to pierce this false impression with an inquiry about an incident where Benedetto failed to fulfill his duties, an act consistent with the Government's theory that the defendant had indeed acted with corrupt purpose.

* Although the specifics of the defendant's conversation with Lustgarten were initially drawn out on the Government's cross-examination of Benedetto, it is not improper to offer rebuttal evidence to refute evidence raised generally by the defense even though the Government first elicited the specifics. *Scott v. United States*, 172 U.S. 343, 347-48 (1899); *United States v. Boatner*, 478 F.2d 737, 743 (2d Cir.), cert. denied, 414 U.S. 848 (1973); *United States v. Vivero*, 413 F.2d 971 (2d Cir. 1969), (per curiam), cert. denied, 396 U.S. 1017 (1969).

POINT III

The Court Did Not Err in Permitting the Government to Inquire as to Benedetto's Use of Drugs.

As his last point, Benedetto argues that it was error to permit the prosecutor to ask him, on cross-examination, whether he ever used drugs and, specifically, whether he ever used cocaine.* In arguing this point, Benedetto forgets that when the Government alerted the District Court of its intention to make this inquiry, defense counsel failed to object and, in fact, explicitly stated that he had no objection to an inquiry about use of cocaine. (Tr. 483, 493). This failure to object waives any right to appellate review of the issue. *United States v. Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

Moreover, the defendant denied using cocaine and the District Court, *sua sponte*, then instructed the jury that a question did not establish a fact if it was answered in the negative. (Tr. 495). Having thus essentially stricken the matter even without a defense request to do so, the District Court eliminated any prejudice which the incident may have engendered.

* Benedetto's appellate brief misstates the record in contending that he was cross-examined as to whether he sold cocaine. (Br. 20). In fact, he was only questioned as to use, not sales.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RAYMOND A. LEVITES,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Raymond Levites

being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 25th day of October, 1977
he served 2 copies of the within Brief for the United States
by placing the same in a properly postpaid franked
envelope addressed:

Litman, Friedman and Kaufman
Attorneys at Law
120 Broadway
Suite 1118
New York, New York 10005

and deponent further says that he sealed the said en-
velope and placed the same in the mail box drop for
mailing in front of the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Raymond Levites

Sworn to before me this

25th day of October, 1977

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978